Supreme Court, U.S.
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No. 91-1698

In The

Supreme Court of the United States

October Term, 1991

ROGER OLSON,

Petitioner,

v.

GENERAL DYNAMICS CORPORATION, a foreign corporation, ALLIED SIGNAL, INC., a foreign corporation, AMEX SYSTEMS CORPORATION (a wholly owned subsidiary of ALLIED SIGNAL, INC.), SCIENCE APPLICATIONS INTERNATIONAL CORPORATION, a foreign corporation, and SAIC RANGE SYSTEMS, a California corporation,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Should this Court contradict Congress' requirement that ERISA plans be in writing by allowing employees to seek to increase their ERISA benefits based upon alleged oral promises through the federal common law?

PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding in the Ninth Circuit were Roger Olson, General Dynamics Corporation, Allied-Signal, Inc., Science Applications International Corporation, and SAIC Range Systems (formerly Amex Systems, Inc.).

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To the Honorable William H. Rehnquist, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

Respondent GENERAL DYNAMICS CORPORATION ("GENERAL DYNAMICS") respectfully submits this

Opposition to the Petition for Writ of Certiorari filed by ROGER OLSON.

OPINION BELOW

The published decision of the Ninth Circuit Court of Appeals is attached to the Petition as Appendix A at pp. 1-13.

JURISDICTION

GENERAL DYNAMICS does not disagree with petitioner's Statement of Jurisdiction.

STATEMENT OF THE CASE

A. Factual History.

1. OLSON's Employment With Respondents.

In July of 1955, OLSON began working for GENERAL DYNAMICS where he was assigned to the Range Systems product line. OLSON later became a vested participant in GENERAL DYNAMICS' employee pension and benefit plans. On March 28, 1986, GENERAL DYNAMICS sold the Range Systems product line to ALLIED-SIGNAL INC.'s subsidiary, AMEX SYSTEMS, INC. ("AMEX"). On April 28, 1986, OLSON accepted AMEX's offer of employment and became a participant in

the AMEX employee benefit plans. On January 8, 1988, AMEX sold the Range Systems product line to SCIENCE APPLICATIONS INTERNATIONAL CORPORATION ("SAIC"), where OLSON worked and participated in SAIC's benefit plans until his retirement in June of 1988.

2. The AMEX Meeting and the Alleged Misrepresentation.

The day before the GENERAL DYNAMICS sale to AMEX, GENERAL DYNAMICS and AMEX representatives held a meeting with the Range Systems employees, including OLSON, to discuss their future employment. At the AMEX meeting, OLSON and the other Range Systems employees were told unequivocally that they were being terminated by GENERAL DYNAMICS as a result of the sale.

As part of the sale, AMEX offered to hire all Range Systems employees. At that meeting, AMEX's President stated in part: "I commit to you that in no way will you be injured. On the bottom line, you will be equal or better to your present position. The details of this will be discussed in personal interviews and they will be scheduled shortly . . . . " That statement is the complete extent of alleged misrepresentation upon which OLSON bases this lawsuit. Apparently, OLSON interpreted it as a promise that his AMEX benefits would be identical to his GENERAL DYNAMICS benefits in every detail.

Other statements at the AMEX meeting establish the unreasonableness of OLSON's interpretation of the statement. For example, other representatives of both companies discussed in detail the AMEX employee benefit

plans, including such benefits as vacation, sick leave, dental, savings plan, and retirement. At one point, AMEX's general manager stated that "we recognize full well that there is [sic] differences in each individual's position or status as they come over to AMEX and we are going to address that in detail in private interviews on an individual basis . . . . " Even during the AMEX meeting where OLSON claims the misrepresentation occurred, he was made aware that the AMEX benefits would not be identical to the GENERAL DYNAMICS benefits.

3. OLSON's Knowledge About the AMEX Benefits Before Accepting AMEX's Offer.

Even if OLSON misunderstood the description of the AMEX benefits during the AMEX meeting, before accepting AMEX's offer, he learned that the AMEX benefits would not be identical to the GENERAL DYNAMICS benefits. Accompanying his acceptance letter to AMEX, OLSON attached four pages of calculations detailing the differences he perceived between the GENERAL DYNAMICS and AMEX benefit plans. It is clear that OLSON suffered no illusions about the AMEX benefits before he started working for AMEX.

4. OLSON's Acceptance of the AMEX Offer.

Regardless of the differences between the GENERAL DYNAMICS and AMEX benefit plans, after being terminated by GENERAL DYNAMICS, OLSON's only choice was between becoming employed by AMEX (which included participation in the AMEX benefit plans with

credit for his years of service at GENERAL DYNAMICS) or looking for another job (where he would receive no credit for his years at GENERAL DYNAMICS). He did not have the option of remaining with GENERAL DYNAMICS and continuing to participate in the GENERAL DYNAMICS employee benefit plans.

Not surprisingly, OLSON chose to work for AMEX, not because of any representations about AMEX's employee benefits, but in spite of them. OLSON accepted AMEX's offer, knowing the benefits were different, because it was the best option available to him at the time.

B. Procedural History.

OLSON filed his complaint in California state court on April 17, 1989. In May of 1989, the respondents removed this case to federal court pursuant to the provisions of 28 U.S.C. section 1441 on the grounds that the federal court had original jurisdiction over this case under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. section 1001, et seq.

GENERAL DYNAMICS promptly moved to dismiss the majority of OLSON's claims because they were preempted by ERISA. On September 25, 1989, the District Court granted GENERAL DYNAMICS' motion to dismiss and gave OLSON 30 days in which to file an amended complaint.

OLSON filed his Amended Complaint on October 9, 1989. GENERAL DYNAMICS again moved to dismiss,

while the other respondents moved for summary judgment on the Amended Complaint. On March 21, 1990, the District Court granted the respondents' motions in a memorandum decision and order which is attached to the petition in Appendix A at pp. 14-19.[1]

On December 20, 1991, the Court of Appeals for the Ninth Circuit issued its decision affirming the District Court. On January 24, 1992, the Ninth Circuit denied OLSON's petition for rehearing.

REASONS FOR DENYING THE PETITION

The Petition for Writ of Certiorari fails to meet the Supreme Court Rule 10 standard of presenting special or important reasons for review on writ of certiorari. Under Supreme Court Rule 10, this Court grants certiorari "only when there are special and important reasons therefor." This case does not merit Supreme Court review for several reasons.

[1] OLSON's Amended Complaint had contained a cause of action for discrimination against GENERAL DYNAMICS under 29 U.S.C. section 1140. OLSON dismissed that claim in order to perfect the appeal.

A. Federal Courts Have Consistently Held That the Written Terms of an ERISA Plan Cannot Be Orally Modified.

It is undisputed that OLSON is receiving every benefit due him under the respondents' written ERISA plans. In this lawsuit, based upon an alleged oral promise, OLSON seeks to receive a level of benefits greater than those he is entitled to under the written terms of the ERISA plans.

Congress has specifically provided that ERISA plans must be in writing. 29 U.S.C. section 1002(a)(1) provides in part:

> Every employee benefit plan shall be established and maintained pursuant to a written instrument.

The writing requirement is a central feature of ERISA, not a mere technicality. A written agreement is required under ERISA to establish and maintain employee benefit plans, thus those terms should be adhered to. *Davidian* v. *Southern California Meat Cutters Union*, 859 F.2d 134 (9th Cir. 1988) and *Musto* v. *American General Corp.*, 861 F.2d 897 (6th Cir. 1988) (written plan is required so employee may determine exactly what his rights and obligations are). The rights of other employees properly covered under the fund should not be ignored, and fund assets should not be deflated because of alleged misrepresentations by a plan administrator. *Davidian* v. *Southern California Meat Cutters Union, supra*, 859 F.2d at p. 136.

OLSON has gone to great lengths to avoid ERISA for the simple reason that "no liability exists under ERISA for purported oral modifications of the terms of an

employee benefit plan." *Straub* v. *Western Union Telegraph Co.*, 851 F.2d 1262, 1265 (10th Cir. 1988). See also *Cefalu* v. *B.F. Goodrich Co.*, 871 F.2d 1290, 1297 (5th Cir. 1989) ("an oral agreement cannot be the basis of a cause of action under ERISA"); *Degan* v. *Ford Motor Co.*, 869 F.2d 889, 895 (5th Cir. 1989) ("ERISA precludes oral modifications to benefit plans"); *Northwest Administrators, Inc.* v. *B.V. & B.R., Inc.*, 813 F.2d 223, 226-227 (9th Cir. 1987) ("an oral agreement or tacit understanding . . . that conflicts with or alters the meaning of the written agreement should not be considered"); *Nachwalter* v. *Christie*, 805 F.2d 956, 960 (11th Cir. 1986) ("this requirement that ERISA plans must be 'maintained' in writing precludes oral modification of the Plans"); and *Musto* v. *American General Corp.*, 861 F.2d 897, 910 (6th Cir. 1988) (clear terms of written employee benefit plan may not be orally modified or superseded by the employer).

The court in *Nachwalter* v. *Christie*, 805 F.2d 956 (11th Circuit 1986) explained why oral agreements or modifications to an ERISA pension plan cannot be enforced. The court cogently reasoned that if oral modifications were permitted, the rights of other plan participants would be jeopardized by oral agreements between plan officers and favored plan participants. *Id.* at 960. In such circumstances, "employees would be unable to rely on these plans if their expected retirement benefits could be radically affected by funds disbursed to other employees pursuant to oral agreements." *Id.* at 960. In sum, permitting oral modification of pension plans would undermine the security of pension rights, the goal Congress sought to serve by requiring that they be put in writing.

B. There Is No Conflict Between the Circuits on This Point.

1. *Armistead* and *Black* Did Not Allow the Plaintiffs to Change the Written Plans Through Estoppel.

OLSON's reliance on *Armistead* v. *Vernitron Corp.*, 944 F.2d 1287 (6th Cir. 1991) and *Black* v. *TIC Investment Corp.*, 900 F.2d 112 (7th Cir. 1990) to assert that there is a conflict among the Circuits is misplaced. The courts in *Armistead* and *Black* allowed the plaintiffs to use the concept of promissory estoppel to prevent their employers from unilaterally terminating the plaintiffs' ERISA benefits which were spelled out in written plans. Neither court allowed the plaintiffs to orally modify the terms of the written plans as OLSON is attempting to do in this case.

2. *Armistead* and *Black* Are Also Distinguishable Because They Did Not Involve the Same Type of Benefit Plans.

OLSON is seeking to increase the level of both his welfare benefits plans *and* his pension plans. In contrast, the plaintiffs in *Armistead* and *Black* were only seeking to receive the welfare benefit plans promised them in writing.

The reason that this distinction is significant is because there are two types of ERISA plans: pension plans, which are funded and have strict vesting and accrual requirements; and welfare plans, which have no such requirements. See *Young* v. *Standard Oil (Indiana)*, 849 F.2d 1039 (7th Cir.), *cert. denied*, 488 U.S. 981, 109 S.Ct.

529, 102 L.Ed.2d 561 (1988). In the case of unfunded welfare plans, there is no particular fund which is depleted by paying benefits. *Black* v. *TIC Investment Corp.*, 900 F.2d 112, 115 (7th Cir. 1990). Thus, there is less concern about the plan's actuarial soundness. *Id.* at 155.

C. This Court Should Not Allow OLSON to Circumvent ERISA by Seeking a Federal Common Law Remedy.

OLSON invites this Court to devise a special remedy for him under the guise of "federal common law." This Court should decline that invitation for the same reason the Ninth Circuit did: "For the reasons already discussed regarding the interplay between ERISA's preemption provision and its remedial scheme, we agree with the District Court that to devise a federal common law remedy for OLSON's claim would defeat the scheme created by Congress in ERISA." (Appendix A to the Petition, p. 13.)

The *Nachwalter* v. *Christie*, 805 F.2d 956 (11th Cir. 1986) court also rejected an attempt to apply federal common law so as to allow oral modifications of employee benefit plans.

> A central policy goal of ERISA is to protect the interests of employees and their beneficiaries in employee benefit plans. This goal would be undermined if we permitted oral modifications of ERISA plans because employees would be unable to rely on these plans if their expected retirement benefits could be radically affected by funds disbursed to other employees pursuant to oral agreements. This problem would be exacerbated by the fact that these oral agreements

> often would be made many years before any attempt to enforce them.

Id. at 960.

This result is consistent with *Massachusetts Mutual Life Ins. Co.* v. *Russell*, 473 U.S. 134, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985), in which this Court held that a fiduciary to an employee benefit plan could not be held liable under ERISA to a plan participant or beneficiary for extra-contractual compensatory or punitive damages caused by untimely processing of claims. This Court noted that ERISA's civil "enforcement scheme [was] crafted with such evident care" that Congress did not intend for implied rights of action to supplement the express provisions. *Id.* at 147-48, 105 S.Ct. at 3092-93. Similarly, ERISA's express requirement that the written terms of a benefit plan shall govern forecloses the argument that Congress intended for ERISA to incorporate state law notions of promissory estoppel. *Straub* v. *Western Union Telegraph Co.*, 851 F.2d 1262, 1265-66 (10th Cir. 1988).

While federal common law may have a place in the interpretation of ERISA when interpretation is necessary,[2] the "common law" concept should not be tortured to include judicially overruling Congress' explicit requirement that ERISA plans be in writing. What OLSON is

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[2] For example, federal common law in an ERISA context may supplement the statutory scheme, it may refine statutory standards that are set out in only general terms, and it may develop legal principles to regulate benefit plans previously within the province of state law. See *Menhorn* v. *Firestone Tire & Rubber Co.*, 738 F.2d 1496, 1499 (9th Cir. 1984). No such interpretation or expansion of ERISA is necessary here.

asking this Court to do is nothing less than to read a preempted state fraud claim back into ERISA in direct contravention of the express statutory language enacted by Congress. Every circuit which has been faced with a case such as this one has held that ERISA preempts all common law causes of action for fraud.[3] As the Fifth Circuit noted in *Degan* v. *Ford Motor Co.*, 869 F.2d 889, 895 (5th Cir. 1989), "[t]he problem, however, is one for Congress and not for this court to resolve, for we are bound by ERISA's emphatic preference for written agreements."

CONCLUSION

Petitioner has not raised an issue that merits a grant of certiorari by this Court. Accordingly, this Court should deny the Petition for Writ of Certiorari.

DATED: May 14, 1992

Respectfully submitted,

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[3] See *Cefalu* v. *B.F. Goodrich Co.*, 871 F.2d 1290 (5th Cir. 1989); *Phillips* v. *Amoco Oil Co.*, 799 F.2d 1464 (11th Cir. 1986), *cert. denied*, 481 U.S. 1016 (1987); *Straub* v. *Western Union Telegraph Co.*, 851 F.2d 1262 (10th Cir. 1988); *Anderson* v. *John Morrell & Co.*, 830 F.2d 872 (8th Cir. 1987); *Blau* v. *Del Monte Corp.*, 748 F.2d 1348 (9th Cir. 1985); and *Scott* v. *Gulf Oil Co.*, 754 F.2d 1499 (9th Cir. 1985).